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No. _____

IN THE

# Supreme Court Of The United States

October Term, 1996

Herbert Ray Hall, an individual,

*Petitioner,*

v.

AMERICAN NATIONAL RED CROSS,
a Federal corporation,

*Respondent.*

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in affirming the district court's order dismissing petitioner Herbert Ray Hall (Hall)'s claim against respondent American National Red Cross ("Red Cross") under the Religious Freedom Restoration Act (RFRA), on the grounds that the Red Cross is not a government instrumentality subject to RFRA, where:

(1) RFRA expressly applies to government instrumentalities:

(2) the Red Cross was adjudged thirty years ago by this Court to be a government instrumentality;

(3) the United States established the Red Cross by statute "under government supervision" to perform important government functions;

(4) the President of the United States appoints eight of the fifty members of the Red Cross's Board of Directors, one such government appointee being the chairperson of the Board and all the others, by statute, being officials from federal departments and Agencies, including the Department of Defense;

(5) the Department of Defense is required by statute to perform an annual financial audit of the Red Cross; and

(6) the Red Cross itself has argued in briefs before this Court that it is *controlled* by the *United States*, in *Department of Employment v. United States*, 385 U.S. 355 (1966) and *American National Red Cross v. S.G.*, 112 S.Ct. 2465 (1992).

## TABLE OF CONTENTS

**Pages**

QUESTION PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 5

I. INTRODUCTION ..... 5

II. THE COURT OF APPEALS ERRED IN NOT ADOPTING THE PLAIN MEANING OF THE TERM "INSTRUMENTALITY" IN RFRA AND CONSEQUENTLY APPLYING THE STATUTE TO THE RED CROSS, WHICH HAS BEEN HELD BY THIS COURT AND NUMEROUS SUBSEQUENT LOWER COURTS TO BE SUCH AN INSTRUMENTALITY AND WHICH HAS REPEATEDLY ADVOCATED THAT STATUS FOR ITSELF ..... 8

III. EVEN IF THE RED CROSS'S STATUS SHOULD BE ANALYZED UNDER CONSTITUTIONAL GOVERNMENT ACTOR STATUS, THE RED CROSS WOULD STILL BE LIABLE UNDER RFRA BECAUSE IT IS A GOVERNMENT-CREATED AND -CONTROLLED CORPORATION CONSISTENT WITH *DEPARTMENT OF EMPLOYMENT* AND *LEBRON* .....10

CONCLUSION .....18

APPENDIX .....1a

## TABLE OF AUTHORITIES

**Cases** **Pages**

**FEDERAL CASES**

*Allah v. Menei*, 844 F. Supp. 1056 (E.D. Pa. 1994) .....10

*American Bankers Mortgage Corporation v. Federal Home Loan Mortgage Corporation*, 75 F.3d 1401 (9th Cir. 1996) .....16,17

*American National Red Cross v. S.G,.* 112 S.Ct. 2465 (1992) .....6,7

*Barton v. American Red Cross,*826 F.Supp. 412 (M.D. Ala. 1993), *aff'd without op.*, 43 F.3d 678 (11th Cir. 1994) .....5

*Barton v. American Red Cross*, 829 F. Supp. 1290 (M.D. Ala. 1993), *cert denied*, 116 S.Ct. 84 (1995) .....6

*Berman v. American Nat. Red Cross*, 834 F. Supp. 286 (N.E. Ind. 1993) .....5

*Clark v. County of Placer*, 923 F. Supp. 1278 (E.D. Cal. 1996) .....17

*Department of Employment v. United States*, 385 U.S. 356 (1966) .....5,10,11,13,14

*Doe v. American Nat. Red Cross*, 837 F. Supp. 121 (E.D.N.C. (1992) .....6

*Doe v. American Nat. Red Cross*, 845 F. Supp. 1152 (S.D.W.V. 1994) .....6

*Doe v. American Nat. Red Cross*, 847 F. Supp. 643 (W.D. Wis. 1994) .....6

*Employment Division v. Smith*, 494 U.S. 872 (1990) .....8

*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) .....8

*Johnson v. Hospital of Medical College*, 826 F.Supp. 942 (E.D. Pa. 1993) .....6

**Pages**

*Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961 (1995) .....5,10,15,16,17

*M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) .....7

*Marcella v. Brandywine Hospital*, 47 F.3d 618 (3rd Cir. 1995) .....6

*United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235 (1989) .....8

**CONSTITUTIONS**

U.S. Const. amend. I .....3,4

Cal. Const. art. 1 § 4 .....3,4

**FEDERAL STATUTES AND RULES**

10 U.S.C. § 711 (a) .....12

28 U.S.C. § 1254 (1) .....2

28 U.S.C. § 1291 .....4

28 U.S.C. § 1331 .....3

36 U.S.C. § 1 **American National Red Cross**.....2,11

36 U.S.C. § 3 .....11

36 U.S.C. § 5 (a) .....11,12

36 U.S.C. § 5 (b) .....12

36. U.S.C. § 5 (c) .....12

36 U.S.C. § 6 .....12

36 U.S.C. § 13 .....12

42 U.S.C. § 1983 .....3,4

42 U.S.C. § 2000bb Religious Freedom Restoration Act.....2,3,8

**Pages**

42 U.S.C. § 2000bb-1 .....8
42 U.S.C. § 2000bb-2 .....8,9
33 Stat. 599 .....11
**Federal Rules of Civil Procedure, Rule 12** (b)(6) .....3,4

## CALIFORNIA STATUTES

Cal. Civ. Code § 51 .....3,4

## OTHER AUTHORITY

Brief for Petitioner, *American National Red Cross v. S.G.*, 112 S.Ct. 2465 (1992) (No. 91-594) .....6,7
91 C.J.S. United States §§ 65 through 66 (1993) .....9
S.Rep. No. 111, 103d Cong. 1st Sess. 12 (1993) .....9,10
Wesley A. Sturges, The legal Status of the Red Cross, 56 Mich. L. Rev. 1 (1957) .....14,15

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in this case was entered on June 18, 1996 and is reported at 86 F.3d 919 (9th Cir. 1996). (App. 1a). The unpublished decisions of the United States District Court for the Central District of California, Santa Ana Division were entered on June 14, 1995 (App. 12a) and on September 11, 1995, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on June 18, 1996. This Petition for Writ of Certiorari was filed

on September 16, 1996 and is timely. The jurisdiction of this Court rests on 28 U.S.C. § 1254(l).

## STATUTES INVOLVED

The text of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (1996) and that portion of Title 36 of the United States Code pertaining to the American National Red Cross, 36 U.S.C. §§1 through 17 (1996), are set forth in the appendix to this Petition.

## STATEMENT OF THE CASE

### 1. Statement of Facts.

In February 1992, petitioner Herbert Ray Hall ("Hall"), who has been diagnosed with full-blown AIDS for several years, applied to be a volunteer HIV/AIDS instructor with the Orange County Chapter of respondent American National Red Cross ("Red Cross"). He informed Susan Sullivan ("Sullivan"), an employee of the County of Orange, California, serving as the Red Cross's HIV/AIDS Education Coordinator, that he made educational presentations about the disease in the public schools on behalf of a local non-profit program and also before religious groups on behalf of a Christian ministry to which he belonged. Sullivan told Hall he "would have to take off your religious hat and be able to put on the hat of the American Red Cross." Hall told her this would pose no difficulty because he already made presentations in public schools without any problems.

Sullivan thereafter placed Hall on a waiting list for the Red Cross's HIV/AIDS instructor certification class. Hall remained on the list for a year, in spite of his frequent telephone calls to Sullivan. Finally, after Hall complained that other persons behind him on the waiting list had been admitted to the class, Sullivan placed him in a certification class in February 1993.

Hall completed the certification class, passing the written and practical examinations which included a practice presen-

tation. Sullivan, however, refused to certify Hall as an instructor because she still believed his involvement in a Christian ministry would somehow influence his Red Cross presentations. Hall was the only member of his class who was refused certification.

When Hall complained that the Red Cross was discriminating against him on account of his religious beliefs, Sullivan offered to grant Hall "conditional" certification, whereby she or someone else from the Red Cross would monitor Hall's Red Cross presentations for any possible religious content. Hall rejected this "conditional" certification as a further act of religious discrimination, because no one else in his class was subjected to such "conditional" certification.

**2. Proceedings and Decisions in the Courts Below.**

On February 21, 1995 Hall commenced this action by filing a complaint in United States District Court, Central District of California Santa Ana Division.

The District Court had jurisdiction over the original proceedings pursuant to 28 U.S.C. §1331, there being a federal question involved.

The complaint raised claims for relief for religious discrimination under (1) the Religious Freedom Restoration Act "RFRA"(42 U.S.C. § 2000bb); (2) the Free Exercise of Religion Clause of the First Amendment to the United States Constitution; (3) article 1 § 4 of the California Constitution; (4) Section 1983 of the Civil Rights Act of 1871; and (5) California Civil Code § 51 (Unruh Civil Rights Act). The complaint also sought injunctive relief.

On April 3, 1995, Hall filed a motion for a preliminary injunction. On that same day, the Red Cross filed a motion to dismiss Hall's complaint. On June 14, 1995, the District Court granted the Red Cross's motion to dismiss the complaint, under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The District Court dismissed with prejudice Hall's Claims for Relief under the Religious Freedom Restoration Act, the First Amendment and the California Constitution, on the grounds that (1) the Red Cross is not a government instrumentality, as defined in the Religious Freedom Restoration Act; and (2) the Red Cross is a private actor, not subject to the constraints of the Free Exercise Clause of the First Amendment and the free exercise provision of the California Constitution. (App. 14a and 16a).

The District Court dismissed without prejudice Plaintiff's claims for relief under Section 1983 and under the Unruh Act. In that same order, the District Court also denied Plaintiff's motion for a preliminary injunction on the grounds that it was predicated on dismissed Claims for Relief. (App. 17a and 18a).

On July 5, 1995, Hall filed his First Amended Complaint, and on July 28, 1995, the Red Cross again filed a motion to dismiss Hall's complaint. On September 11, 1995 the District Court granted Defendant Red Cross's Rule 12(b)(6) motion to dismiss to Plaintiff's First Amended Complaint.

On September 28, 1995, Hall timely filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The jurisdiction of that court was founded on 28 U.S.C. § 1291. Hall appealed only the dismissal of his RFRA claim. The court of appeals affirmed the district court's dismissal on the grounds that the Red Cross is not a government instrumentality subject to RFRA or to the Free Exercise Clause of the United States Constitution, and entered judgment on June 18, 1996. (App 11a).

## REASONS FOR GRANTING THE WRIT

### I. INTRODUCTION

The time has come to determine, once and for all, the legal status of the American National Red Cross. Thirty years ago, this Court held in *Department of Employment v. United States,* 385 U.S. 355 (1966), that the Red Cross is a government instrumentality and thus immune from taxation. Yet until this case, no court, either state or federal, had ruled whether the Red Cross's status as a government instrumentality subjected it to constitutional constraints.

Here, the court of appeals ruled, contrary to this Court's holding in *Department of Employment*, that the Red Cross is not a government instrumentality subject to the Free Exercise Clause of the First Amendment, and therefore is not a government instrumentality subject to RFRA, despite the fact that RFRA expressly applies to government instrumentalities. (App.23a ). The court held that the Red Cross, although a government-created corporation, was not controlled by the United States merely because the government does not appoint a majority of its directors, applying the Court's ruling in *Lebron v. National R.R. Passenger Corp.,* 115 S.Ct. 961 (1995). (App.8a )

This ruling adds to the judicial confusion nationwide about the Red Cross's legal status, in spite of *Department of Employment's* seemingly dispositive treatment of that issue. This confusion is partly engendered by the Red Cross itself, which has strenuously advocated its status as a government instrumentality in cases where it was seeking immunity from jury trials, punitive damages, and lawsuits against its employees. There have been conflicting results among the circuits. Some courts have afforded the Red Cross the immunity it sought,[1] while other courts have

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[1] *Berman v. American Nat'l Red Cross,* 834 F. Supp. 286 (N.D. Ind. 1993) (immunity from jury trial); *Johnson v. Hospital of Medical College of Pennsylvania,* 826 F. Supp. 942 (E.D. Pa. 1993)(immunity from jury trial); *Barton v. American Red Cross,* 826 F. Supp. 412 (M.D. Ala. 1993),

refused immunity by finding the Red Cross not sufficiently related to the government.[2]

These cases are in addition to the numerous removal cases in which the Red Cross repeatedly has argued that its government instrumentality status entitled it to original federal jurisdiction, until that issue was settled by this Court in *American Nat'l Red Cross v. S.G.*, 112 S.Ct. 2465 (1992).

Indeed, the Red Cross has even argued in briefs to this Court that it is *controlled* by the United States, first in Department of Employment and most recently in *S.G. See* Brief for Petitioner at 32-33, *American Nat'l Red Cross v. S.G.*, 112 S.Ct. 2465 (1992)(No. 91-594).[3]

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aff'd without op., 43 F.3d 678 (11th Cir. 1994) and 829 F. Supp. 1290 (M.D. Ala. 1993), *cert. denied*, 116 S.Ct. 84 (1995) (immunity from jury trial and Red Cross employees immune from lawsuits); *Doe v. American Nat'l Red Cross*, 837 F.Supp. 121 (E.D.N.C. 1992) (immunity from punitive damages).

[2] *Marcella v. Brandwine Hosp.* 47 F.3d 618 (3rd Cir. 1995) (no immunity from jury trial); *Doe v. American Nat'l Red Cross*, 847 F.Supp. 643 (W.D. Wis. 1994) (no immunity from jury trial; *Doe v. American Nat'l Red Cross*, 845 F. Supp. 1152 (S.D.W.V.1994) (no immunity from jury trial or from punitive damages).

[3] The Red Cross argued in its *S.G.* Petitioner's Brief:

> Finally, there is no good reason to suppose that Congress intended to require the Red Cross (or other entities whose charter interpretation will be affected by the decision in this case) to litigate in state court. To the contrary, there are good reasons to afford the Red Cross a federal forum in all cases.
>
> Congress determined in 1905 that the importance of the Red Cross's work warranted reincorporation under federal supervision. [Cite Omitted]. Congress deemed federal supervision necessary because of the "national stature of the Red Cross" and the "national interests" served by the Red Cross. Harriman Committee Report 15 [further cite omitted]. "The federal government still maintains ample supervision of and *control over* the Red Cross activities through the 'specific duties' imposed upon it by Congress, the existing agreements between

In this case, however, the Red Cross has argued that it is *not* controlled by the United States and that its status as a government instrumentality is limited to immunity from taxation, in the tradition of *M'Culloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819) .

Plainly, the Red Cross ultimately seeks a centaur-like legal status - part government, for the sake of immunity from taxation, jury trials, punitive damages and lawsuits against its employees; and part non-government, for the sake of avoiding constitutional constraints. In pursuing this status, the Red Cross is leaving in its wake a body of conflicting case law which bodes confusion over the legal status of other, similar government instrumentalities.

As such, this case warrants review by this Court to determine the Red Cross's legal status as it relates to RFRA, consistent with the prior rulings of this Court and with the Red Cross's own representations that it is a government-controlled instrumentality.

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Red Cross and various executive departments, *the annual audit of the Red Cross by the Department of Defense,* and the fact *that Red Cross personnel are subject to Defense Department regulation* and, at least in time of war, *to the direction of the armed forces in battle areas." Department of Employment* Brief 30-31.

Brief for Petitioner at 32-33, *American Nat'l Red Cross v. S.G.,* 112 S.Ct. 2465 (1992) (No. 91-594) (emphasis added).

## II. THE COURT OF APPEALS ERRED IN NOT ADOPTING THE PLAIN MEANING OF THE TERM "INSTRUMENTALITY" IN RFRA AND CONSEQUENTLY NOT APPLYING THE STATUTE TO THE RED CROSS, WHICH HAS BEEN HELD BY THIS COURT AND NUMEROUS SUBSEQUENT LOWER COURTS TO BE SUCH AN INSTRUMENTALITY AND WHICH HAS REPEATEDLY ADVOCATED THAT STATUS FOR ITSELF.

Congress enacted RFRA in 1993 in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). Section 2000bb-l(a) provides that, "Government shall not substantially burden a person's exercise of religion. . . ." (App. 22a). The term "government" is defined under § 2000bb-2 of RFRA to "include[ ] a branch, department, agency, **instrumentality**, and official (or other person acting under the color of law) of the United States, a State, or subdivision of a State." (Emphasis added) (App. 23a). The term "instrumentality" as used in § 2000bb-2 is not itself defined under any of the provisions of RFRA nor is it discussed anywhere in the lengthy legislative history of the Act.

This Court has provided a clear approach to statutory construction in cases, such as this, where a statutory term is not defined and its meaning is disputed. For instance in *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235 (1989), this Court observed:

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. *Ibid.*

*Id.* at 242.

Applying this rule here, Congress apparently used the term "instrumentality" in its ordinary legal sense because it is used in conjunction with a number of other terms for governmental entities, e.g. "a branch, department, agency, . . . and official (or other person acting under the color of law) of the United States, a State or subdivision of a State." 42 U.S.C. § 2000bb-2. (App. 23a). This enumeration of a variety of government manifestations indicates that Congress intended a broad application of RFRA's religious free exercise protection from actions by the Federal and state governments themselves, their agents and their creatures. Generally, a corporation created by Congress to further its governmental objectives is an "instrumentality" of the government. *See* 91 C.J.S. *United States* § 66 (1993).

Since the court of appeals found the Red Cross to be such a congressional creation to further government objectives (App.7a), it would not have been "demonstrably at odds with the intentions of the drafters" of RFRA for the court to find the Red Cross subject to the statute on account of its status as a government instrumentality.

The court of appeals, however, instead extracted a comment in the Senate Judiciary Committee Report on the Act to indicate a different congressional intent as to the meaning of the term "instrumentality:"

> To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [sic] free exercise jurisprudence under the compelling government interest test prior to *Smith*.

S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993).

From this comment, the court of appeals concluded that "Congress did not intend the Act to create a broader class of government actors than previously existed under the Free Exercise Clause of the First Amendment ." (App. 6a). The court went on

to hold, in effect, that RFRA is limited to institutions that are "part of the government itself." (App. 6a ).

The court thus limited the class of government actors subject to RFRA based solely upon this comment. But appealing as this quote appears standing alone, it in fact is taken entirely out of context from a section of the Report entitled "NO RELEVANCE TO THE ISSUE OF ABORTION." Reading the quote above in its context reveals that it has nothing whatsoever to do with congressional intent as to the meaning of "instrumentality" in the Act, or that of any other defined term. That passage dealt solely with the effect RFRA may have on the abortion controversy, an issue which occupied much of the legislative history on the Act and which was clearly on the minds of the drafters.

Contrary to the Red Cross's argument, RFRA is remedial and is to be interpreted broadly. *See Allah v. Menei*, 844 F. Supp. 1056 (E.D. Pa. 1994). To extrapolate this passage out of context is a serious mistake and one which in this case has resulted in a limitation on the scope of RFRA that is unwarranted and deserves review by this Court.

## III. EVEN IF THE RED CROSS'S STATUS SHOULD BE ANALYZED UNDER CONSTITUTIONAL GOVERNMENT ACTOR STATUS, THE RED CROSS WOULD STILL BE LIABLE UNDER RFRA BECAUSE IT IS A GOVERNMENT-CREATED AND -CONTROLLED CORPORATION, CONSISTENT WITH ITS AUTHORIZING STATUTES, *DEPARTMENT OF EMPLOYENT* AND *LEBRON*

The court of appeals, in determining that the Red Cross was not controlled by the United States and therefore not subject to RFRA or the First Amendment, did not adequately analyze the statutes authorizing the Red Cross, the legislative history to those statutes, or *Department of Employment*, the most important case interpreting those statutes. To demon-

strate this lack of analysis, a brief review of the statutes and *Department of Employment* is necessary.

The American National Red Cross, originally named the "The American National Association of the Red Cross," was formed in the District of Columbia in July 1881. In 1893, the Red Cross was reincorporated under the laws of the District of Columbia and reincorporated again by Act of Congress in 1900.

The present statutory authority for the Red Cross, 36 U.S.C. §§ 1 et. seq., was enacted by Congress in 1905 "because it is believed that the importance of the work [of the Red Cross] demands a repeal of the present charter and a reincorporation of the society *under Government supervision* . . . ." Preamble, Act Jan. 5, 1905, ch. 23, § 1 in part, 33 Stat. 599. (Emphasis added). (App. 32a).

The Red Cross serves important functions for the federal government, as set forth in 36 U.S.C. § 3. First, the Red Cross furnishes volunteer aid to the sick and wounded of the military in time of war in accordance with various Geneva conventions to which the United States is a party. *Id.* (App.37a-38a ). In addition, the Red Cross provides voluntary relief and acts as a medium of communication between the people of the United States of America and their Armed Forces, and with other nation's humanitarian organizations *Id.* (App. 38a). Finally, the Red Cross "carr[ies] on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods and other great national calamities, and to devise and carry on measures for preventing the same." *Id.* (App. 38a).

These activities by the Red Cross are overseen by a Board of Governors consisting of fifty persons. 36 U.S.C. § 5. (App. 40a). Eight of the Governors are appointed by the President of the United States, one of whom is "designated by the President of the United States to act as principal officer [i.e., Chairperson] of the corporation . . . ." 36 U.S.C. § 5(a). (App. 40a). The other

seven governors appointed by the President of the United States must "be officials of departments and agencies of the Federal Government, whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives. Of these at least one and not more than three shall be selected from the armed forces." *Id.* (App. 40a).

While the rest of the Governors are selected by the local Red Cross chapters and by the Board of Governors itself (36 U.S. §§ 5(b) and 5(c)) (App. 40a-41a), it is plain that the Federal government controls the Red Cross, through the President of the United States' empowerment to appoint the principal officer of the organization, along with other high government and armed forces officials.

The United States has retained for itself two important means of control of the Red Cross. First, by statute, the Red Cross is subject to the authority of a key agency of the Executive Branch - the Department of Defense. The Red Cross is required to annually provide to the Secretary of Defense a "full, complete and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the Department of Defense, and a copy of said report transmitted to Congress by the Department of Defense." 36 U.S.C. § 6. (App. 43a-44a). Such executive fiscal audit requirements are typical of government oversight of its branches, agencies and instrumentalities, and would not be imposed on purely private organizations.

Furthermore, 10 U.S.C. § 711(a) authorizes the Secretaries of Army, Navy and Air Force to detail commissioned officers into the Red Cross's Armed Forces Division and *"to be in charge of the first-aid department."* 10 U.S.C. § 711 (a)(1996). (Emphasis added).

The Red Cross is even subsidized by the United States to the extent that the building in Washington, D.C. which houses the Red Cross's national headquarters is provided by the federal government. 36 U.S.C. §13 (App. 46a-47a).

In *Department of Employment,* this Court carefully and succinctly examined all of this statutory authority in holding that "the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation . . . . " *Id.* at 358. In that case, the Red Cross and the United States, as co-plaintiffs, brought an action to enjoin enforcement against the Red Cross of the Colorado Employment Security Act, imposing unemployment compensation tax upon wages paid to Colorado based employees of the Red Cross. *Id.* at 356-57.

In concluding that the Red Cross was immune from such a tax because it is a government instrumentality, this Court paid close attention to the purpose and structure of the Red Cross in reaching its conclusion, as follows:

> Although there is no simple test for ascertaining whether an institution is so closely related to government activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. [Cite omitted]. Congress chartered the present Red Cross in 1905, subjecting it to government supervision and to a regular financial Audit by the Defense . . . Department. [Cite omitted]. Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 governors. [Cite omitted]. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and

> acted in reliance on the Red Cross' status virtually as an arm of the Government.

*Id.* at 358-60. (Emphasis added).

This important passage from *Department of Employment* demonstrates that this Court carefully considered the governmental duties imposed on the Red Cross; the President's appointment powers; the Red Cross's functional relationship with the Armed Forces; the United States' material assistance to the Red Cross; and its annual audit by the Department of Defense. It is evident from this passage that this Court did not confer instrumentality status upon the Red Cross simply because it performed a public service, but *rather because this Court found that the Red Cross operated under the supervision of the United States - that is, under the control of the United States.*

In its holding in *Department of Employment*, this Court relied on a well-known scholarly article by Wesley A. Sturges, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1 (1957), which contains a thorough analysis of the legal status of the Red Cross resulting from all its interactions with the government, concluding that the Red Cross is an "integral unit of the government [and] it may 'partake of whatever immunities it [the government] may have under the Constitution and federal statutes.' " *Id.* at 32.

Numerous passages throughout the Sturges article support a finding here that the Red Cross is an instrumentality of the federal government. For instance:

> The obligations imposed upon the [Red Cross] corporation to aid the government of the United States in the fulfillment of its undertakings under the Geneva treaties should, perhaps, be emphasized as the most telling indication of its stature as an instrumentality of the United States.

*Id.* at 14. (Emphasis added).

Sturges further cites an opinion dated August 15, 1918 by then United States Solicitor General John W. Davis, stating:

> When any question arises as to the scope and activities of the American Red Cross, *it must always be remembered that its charter is not only a grant of power but an imposition of duties.* The American Red Cross is a quasi-governmental organization, operating under Congressional charter, officered in part, at least by government appointment, disbursing its funds under the security of a government audit and designated by Presidential order for the fulfillment of certain treaty obligations into which the government has entered.

*Id.* at 15. (Emphasis added).

All of these passages reflect an understanding by those who have closely reviewed the purpose and structure of the Red Cross, including this Court, that when the United States imposes governmental duties on an entity which it has created, it also maintains at least a degree of control, as it has here with the Red Cross through Presidential appointments of government officials as directors, an annual government financial audit, and even detailing of military officers to run a certain department of the Red Cross.

The foregoing received scant attention by the court of appeals in its determination that the United States does not control the Red Cross and therefore that it is not subject to RFRA or the Constitution. Instead, the court applied the two-prong test set forth in *Lebron* for determining if a government corporation should be subject to the First Amendment. As the court related the test, a government corporation is subject to the First Amendment "(1) when the corporation is created for the furtherance of governmental objectives and (2) when government [sic] retains for itself permanent authority to appoint

the majority of directors of the corporation. *Lebron*, __U.S.__ , 115 S.Ct. at 974-75." (App.7a).

The court correctly found that the Red Cross satisfied the first part of the test, in that it was created by the United States to further governmental objectives. (App, 7a-8a). But the court found that the second part of the test was not satisfied because the United States appoints only eight of the fifty Red Cross directors and therefore did not retain for itself permanent authority to appoint only a majority of directors. (App. 8a). Thus, without considering in detail the purpose and structure of the Red Cross as set forth above, the court determined that there was no government control of the Red Cross for constitutional purposes merely because the number of government-appointed directors was less than half.

This was not the first time the Ninth Circuit had used *Lebron* to this effect. Four months before deciding this case, the court of appeals held that the Federal Home Loan Mortgage Corporation ("Freddie Mac") was not subject to the Fifth Amendment, even though it was created to further government objectives, because the government appointed five of its eighteen directors. *American Bankers Mortgage Corporation v. Federal Home Loan Mortgage Corporation*, 75 F.3d 1401, 1406 (9th Cir. 1996).

This arbitrary application of the holding in *Lebron* relegates the careful, detailed analysis in that opinion of the history, purpose and legal status of government-created corporations to a mere "head-counting" exercise. In fact, *Lebron* does not require such an arbitrary result. That case holds that where the government retains the right to appoint a majority of the directors it is deemed to control the corporation if it was created to further governmental objectives; nothing in *Lebron* requires that a corporation created for such objectives *automatically* is not government-controlled because the government appoints less than half of its board. The number of gov-

ernment appointed directors should serve only as evidence of government control; it should not end the inquiry.

It does not take much imagination to see the undesirable results of such an arbitrary application of the *Lebron* test: if the government appointed *twenty-five* of the Red Cross's fifty directors - exactly half, but not a majority - would the courts still rule that there was no government control, without looking at any other factors that may impose control, such as the nature of the individuals appointed, the duties imposed upon the organization by statutes, etc.?

The fact that *Lebron* does not need to be read in such an arbitrary manner is seen in a district court case within the Ninth Circuit, which was decided before this case, but after briefing and after *American Bankers - Clark v. County of Placer,* 923 F. Supp. 1278 (E.D. Cal. 1996). The district court applied the *Lebron* test to the Placer County Fair Association ("PCFA"), a non-profit corporation with no government appointees on its board, and still found the PCFA subject to a Section 1983 claim after carefully reviewing ordinances and other factors showing that the Placer County Board of Supervisors substantially controlled the organization, even without appointees on the board. *Id.* 1283-84.

This inconsistent and arbitrary application of *Lebron*, the inconsistent treatment of the Red Cross's legal status among the circuits, and the need to finally determine the meaning of the term "instrumentality" in RFRA all merit this Court's review of this case.

## CONCLUSION

For all of the foregoing reasons, petitioner Herbert Ray Hall respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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September 16, 1996

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| HERBERT RAY HALL,<br>*Plaintiff-Appellant,*<br>v.<br>AMERICAN NATIONAL RED CROSS, a Federal corporation,<br>*Defendant-Appellee.* | No. 95-56468<br>D.C. No. CV-95-00131-GLT<br>OPINION |

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted June 4, 1996*
Pasadena, California

Filed June 18, 1996

Before: Jerome Farris, Ferdinand F. Fernandez and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

## SUMMARY

### Individual Rights/Religious Freedom

The court of appeals affirmed a district court judgment. The court held that the American National Red Cross is not an

*The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

instrumentality of the United States subject to the Religious Freedom Restoration Act (RFRA).

Appellant Herbert Hall sued appellee the American National Red Cross, asserting that the Red Cross violated the RFRA. Hall alleged that he, a member of a Christian ministry, applied to be a Red Cross-certified HIV/AIDS instructor, completed the certification class and passed all required written and practical examinations, and was then offered only "conditional certification" to be based upon monitoring of his speaking engagements for religious content. The district court dismissed his complaint. Hall appealed, contending that the Red Cross is an instrumentality of the United States under the RFRA.

[1] The RFRA provides that the "government" shall not substantially burden a person's exercise of religion, except as provided in a certain subsection. [2] Under the RFRA, the term "government" includes an "instrumentality" of the United States.

[3] Congress did not intend the RFRA to create a broader class of government actors than previously existed under the Free Exercise Clause of the First Amendment. Use of the word "instrumentality" in a general, inclusionary definition does not indicate an intention to encompass entities that are not a part of the government, even though they may be governmental "instrumentalities" in some sense.

[4] The status of the Red Cross had to be considered under a First Amendment analysis to determine RFRA liability. [5] Traditionally, otherwise private entities are considered to be government actors under the First Amendment if they have a sufficient structural or functional nexus to the government. [6] However, because the government has not retained permanent authority to appoint the majority of the Red Cross governing board, the Red Cross is not a government actor under a relevant structural analysis of government chartered corporations.

[7] In addition, the Red Cross could not be considered a government actor under a functional analysis. [8] Hall did not allege any nexus between the government's involvement with the Red Cross and the Red Cross's decision not to certify him as an instructor. [9] That the Red Cross had been considered a government instrumentality in tax immunity cases was not dispositive.

[10] Because the Red Cross is not a government actor under the First Amendment, it is not subject to the RFRA.

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## COUNSEL

James A. Hayes, Jr., Laguna Niguel, California, for the plaintiff-appellant.

Teresa A. Beaudet, Mayer, Brown & Platt, Los Angeles, California, for the defendant-appellee.

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## OPINION

THOMAS, Circuit Judge:

The question presented in this case is whether the American National Red Cross ("Red Cross") is an instrumentality of the United States subject to the Religious Freedom Restoration Act. We conclude that it is not and affirm dismissal of the complaint.

### *Background*

According to his complaint, Herbert Ray Hall ("Hall") applied to be a Red Cross-certified HIV/AIDS instructor. He informed Susan Sullivan, the Orange County Chapter Red Cross AIDS Education Coordinator, that he was HIV-positive

and a member of Naamen's Fellowship, a Christian ministry. Coordinator Sullivan informed Hall he "would have to take off [his] religious hat and be able to put on the hat of the American Red Cross" in order to be certified. Hall told Sullivan the restriction did not pose any difficulty. Sullivan expressed reservations, but placed Hall on a waiting list for an HIV/AIDS instructor certification class.

Hall completed the certification class and passed all required written and practical examinations. He was then informed by Sullivan the Red Cross was not going to certify him as an instructor because Sullivan did not believe he could separate his religious convictions from his Red Cross duties. In response to Hall's threatened legal action, she offered "conditional certification" to be based upon monitoring of his speaking engagements for religious content. Hall declined the offer because "this was not done for anyone else in the class" and he "would not tolerate religious discrimination" by the Red Cross.

Hall filed this action alleging, *inter alia*, that the Red Cross violated the Religious Freedom Restoration Act ("RFRA" or "the Act"). The District Court dismissed Hall's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). He appeals only the dismissal of the RFRA claim.

*Analysis*

Hall claims the Red Cross is an instrumentality of the United States under the Act which burdened his free exercise of religion by refusing to certify him as an HIV/AIDS instructor because of his religious beliefs. Without reaching the other issues presented, we find the Red Cross is not subject to the Act and affirm the district court's dismissal.

We review dismissal for failure to state a claim *de novo*. *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992).

In 1993, Congress passed RFRA in reaction to *Employment Division v. Smith*, 494 U.S. 872 (1990). The purposes of the Act are:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

**[1]** To meet these purposes, the Act provides in relevant part:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

42 U.S.C. § 2000bb-1(a).

The Act creates a judicial remedy:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1(c).

**[2]** Under the Act, the term "government" includes "a branch, department, agency, *instrumentality*, and official (or other person acting under color of law) of the United States,

a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2 (emphasis supplied). The term "instrumentality" is not defined in the Act, nor is its definition discussed in the legislative history.

[3] We find that Congress did not intend the Act to create a broader class of government actors than previously existed under the Free Exercise Clause of the First Amendment. As the Senate Judiciary Committee stated in its report on the Act:

> To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [sic] free exercise jurisprudence under the compelling government interest test prior to Smith.

S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993).

[4] Given the strong Congressional intent not to expand the class of government actors, why did Congress use the word "instrumentality" in the Act? The probable reason is that courts sometimes use the phrase "agency or instrumentality" when they are actually asking whether a particular institution is part of the government itself. *See, e.g., Lebron v. National R.R. Passenger Corp.*, ___ U.S. ___, ___, 115 S. Ct. 961, 972, 130 L.Ed.2d 902 (1995). Because the language used by courts to refer to entities which are actually part of the government itself is not always precise, Congress's incorporation of words which are sometimes used to refer to those entities simply indicates a desire to encompass all parts of the government itself within the Act. Thus, the use of the word "instrumentality" in a general, inclusionary definition does not indicate an intention to encompass entities which are not a part of the government, even though they may be governmental "instrumentalities" in some sense.

Hall attaches special importance to the fact that a version of RFRA introduced in a prior session of Congress contained

a different definition of "government" which did not include the word "instrumentality." The two definitions are not so markedly different as to evidence any special Congressional intent. Moreover, legislative history of one act cannot be transferred to a second and similar act. *Wetlands Water Dist. v. Nat'l Resources Defense Council*, 43 F.3d 457, 462 (9th Cir. 1994).

[5] Thus, we must consider the status of the Red Cross under a First Amendment analysis to determine RFRA liability. Traditionally, otherwise private entities are considered government actors under the First Amendment if they have a sufficient structural or functional nexus to the government. Under a "structural" analysis, or "government entity" test, a corporation created by special law is part of the government for the purposes of the First Amendment (1) when the corporation is created for the furtherance of governmental objectives and (2) when government retains for itself permanent authority to appoint the majority of directors of the corporation. *Lebron*, ___ U.S. at ___, 115 S.Ct. at 974-75; *see American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1406 (9th Cir. 1996).

The first part of the *Lebron* test is satisfied in this case. The Red Cross originated as a private corporation, organized under the laws of the District of Columbia in 1881. Wesley A. Sturgis, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1, 10 (1957). Congress reincorporated the Red Cross in 1905 because "the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision. . . ." 33 Stat. 599. The major purposes of the Red Cross include furnishing "volunteer aid to the sick and wounded of the Armed Forces in time of war;" acting as a "medium of communication between the people of the United States of America and their Armed Forces;" providing a "system of national and international relief in times of peace;" and using the system in "mitigating the sufferings caused by pestilence, famine, fire, floods and other great

national calamities." 36 U.S.C. § 3. Clearly, congressional creation of the Red Cross furthered government objectives.

[6] However, the second prong of the *Lebron* test is not satisfied in this case. The Red Cross Board of Governors consists of fifty persons. 36 U.S.C. § 5. Eight of the governors are appointed by the President of the United States; the remaining forty-two are selected by local Red Cross chapters and by the Board of Governors itself. 36 U.S.C. § 5. The daily affairs of the Red Cross are not controlled by government officials. *Irwin Memorial Blood Bank v. American Nat'l Red Cross*, 640 F.2d 1051, 1056 (9th Cir. 1981). Because the government has not retained permanent authority to appoint the majority of the Red Cross governing board, the Red Cross is not a government actor under the *Lebron* structural analysis of government chartered corporations. *See also American Bankers Mortgage*, 75 F.3d at 1409 (holding that the Federal Home Loan Mortgage Corp. did not meet the "government entity" test because less than one-third of its directors were appointed by the government).

[7] Similarly, the Red Cross cannot be considered a government actor under a functional analysis. A "functional" analysis, or "federal action" test, examines whether the organization's activity constitutes federal action considering (1) the nexus between the government and the challenged action, (2) whether the alleged government actor performed functions traditionally reserved to the government, and (3) whether the government coerced or encouraged the challenged action. *American Bankers Mortgage*, 75 F.3d at 1409 (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-546 (1987)).

[8] In this case, Hall has not alleged any nexus between the government's involvement with the Red Cross and the Red Cross's decision not to certify Hall as an instructor. In conducting the instructor certification program, the Red Cross was not performing a function traditionally reserved for the

government. Hall does not allege that the government coerced or encouraged the Red Cross not to certify him. Absent such participation or coercion, Hall has not established the requisite federal action even if, as Hall alleges, the HIV/AIDS education program is at least partially government funded. *See Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982); *San Francisco Arts*, 483 U.S. at 544. Thus, the Red Cross cannot be considered a government actor under the facts of this case under a "functional" or "federal action" analysis.

[9] Hall correctly points out that the Red Cross has been considered a government instrumentality in tax immunity cases. *Department of Employment v. United States*, 385 U.S. 355, 359-60 (1966); *United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990). However, this fact is not dispositive of the issues presented here. The question of whether a corporation is performing sufficient secondary or derivative government functions to be shielded from state taxation under *M'Culloch v. Maryland*, 17 U.S. (Wheat) 316 (1819) is a far different question from whether it is subject to a constitutional restriction against burdening free exercise of religion. Indeed, specifically concerning the Red Cross, we explicitly rejected the argument that the meaning of "instrumentality" for intergovernmental tax immunity purposes could be equated to the meaning of a government "instrumentality" in other contexts. *City of Spokane*, 918 F.2d at 88. We termed this a "serious logical and semantic error. . . . based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted into an entirely different context." *Id.*

Government-created corporations are often held to be tax-immune government instrumentalities, but courts have also frequently found them not to be subject to constitutional treatment as government actors. *Compare United States v. Michigan*, 851 F.2d 803, 805 (6th Cir. 1988) (holding federal credit unions to be government instrumentalities immune from state taxation) *with Jesinger v. Federal Credit Union*, 24 F.3d

1127, 1132 (9th Cir. 1994) (holding a federal credit union not to be a government actor for Constitutional purposes). As with many other government-chartered corporations, the legal status of the Red Cross has varied depending on the context in which it has been examined. For example, in contrast to the tax immunity decisions, we have held the Red Cross *not* to be a government agency subject to the Freedom of Information Act. *Irwin Memorial*, 640 F.2d at 1057. Similarly, the Third Circuit has held the Red Cross not to be a government entity immune to trial by jury. *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995).

In the case of the Red Cross, part of the seeming contradiction is due to the very nature of the corporation. While the Red Cross performs many important functions for the United States, "[a] perception that the organization is independent and neutral is equally vital." *Marcella*, 47 F.3d at 621. Political autonomy was a prerequisite for recognition of the Red Cross as a National Society by the Red Cross International Committee. *Irwin Memorial*, 640 F.2d at 1057. In order to fulfill its role under the Geneva Convention, the Red Cross must be independent of the United States government. *Marcella*, 47 F.3d at 624. Thus, to fulfill its chartered purpose, the Red Cross must perform functions for the United States while remaining an independent and autonomous organization. This dual role makes it appropriate for the courts to extend the shield of sovereign immunity to some Red Cross activities, but improper to impose constitutional restrictions on others.

Here, we are limited to examining the status of the Red Cross under the Free Exercise Clause of the First Amendment in its function of certifying HIV/AIDS instructors. In this context, the result is clear. Red Cross employees and volunteers are not employees of the federal government. *Marcella*, 47 F.3d at 622. The United States does not provide civil service benefits to Red Cross employees or volunteers. *Id.* at 624. Given these circumstances, we decline to extend the restric-

tions of the Free Exercise Clause to a privately managed HIV/AIDS instruction certification program.

[10] Because the Red Cross is not a government actor under the First Amendment, we find that the Red Cross is not subject to the Religious Freedom Restoration Act. Accordingly, it is not necessary to reach the other issues raised by Hall, nor to judge the appropriateness of the Red Cross's actions here. The district court's dismissal of Hall's amended complaint is AFFIRMED.

**NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERBERT RAY HALL,

*Plaintiff,*

vs.

AMERICAN NATIONAL RED CROSS, a Federal Corporation,

*Defendant.*

Filed Jun 14, 1995
Clerk, U.S. District Court
Central District Of California
Santa Ana Office
Deputy

Case No. SACV 95-131 GLT (EEx)

**ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Defendant's motion to dismiss is granted with prejudice in part, but with leave to amend as to the balance. Plaintiff's motion for a preliminary injunction is denied.

The 1st Amendment's Free Exercise Clause and the California Constitution's Free Exercise Clause each are a restraint on government action, not private action. *See Martin v. Pacific Northwest Bell Tel. Co.,* 441 F.2d 1116, 1117-18 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971); *Bennett v. Livermore Unified School District*, 193 Cal. App. 3d 1012, 1016-1017 (1987).

The Red Cross has been held to be a government actor for state tax liability purposes. *See Department of Employment v. United States*, 385 U.S. 355, 358 (1966) (holding Red Cross is "an instrumentality of the United States for purposes of immunity from state taxation levied on its operations . . ."); *U.S. v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) (same). But it has been held not to be a government actor for Freedom of Information Act ("FOIA") purposes. *See Irwin Memorial Blood Bank v. American Nat. Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (holding Red Cross is not an agency for FOIA purposes).

No court has decided whether the Red Cross is a government actor in the context of constitutional prohibitions. The holdings in *Irwin Memorial*, *Department of Employment*, and *City of Spokane*, cannot be directly applied to the constitutional context. See *City of Spokane*, 918 F.2d at 88 (explaining *Irwin Memorial* was limited to the FOIA context and to

> extrapolate from that holding to the area of the law which we must deal with here [state taxation]would be a serious logical and semantic error . . . . It would insist upon that based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context. We eschew that extrapolation).

Although the Court can look to these decisions for guidance about the character of the Red Cross, it must look to case law analyzing whether other organizations are government actors in the constitutional context.

"Most fundamental[]" to the issue of whether an organization is a government organization for Constitutional purposes, is whether the government has "exercised coercive power or has provided such significant encouragement, either overt or covert," that the action of the organization must be deemed to be government action. *San Francisco Art & Ath-*

*letics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 546 (1987). Mere regulation by the government, however, does not transform the actions of the organization into government action. *Id.* at 545.

Another significant factor is whether an organization performs functions that "traditionally [have been] the exclusive prerogative' of the Federal Government." *Id.* at 544 (citations omitted) (emphasis in original). However, the fact "a private entity performs a function which serves the public does not make its acts [governmental] action." *Id.* (citations omitted). Receiving government funding also does not necessarily make an organization a government actor for constitutional purposes; the government may subsidize private entities without assuming constitutional responsibility for their actions. *Id.*

Given the purposes and organizational structure of the Red Cross, which the Court judicially notices, the Court holds the Red Cross is not a government actor in the constitutional context. This conclusion is based on several factors:

The Federal government is unable to exercise coercive power over the Red Cross. Nothing in Red Cross's chartering statute gives the Federal government the power to control the agency. *See San Francisco Art & Athletics, Inc.*, 483 U.S. at 546 (holding the Olympic Committee is not a government actor for constitutional purposes, noting nothing in USOC's corporate charter gave Federal government the right to control it). The President only appoints eight out of fifty board members of the Red Cross. *Cf. Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961 (1995) (holding Amtrak is a government entity whose actions are subject to constitutional challenge, noting the President appoints 6 out of 9 externally named directors, giving Federal government much control over the corporation). None of the Red Cross's employees are Federal employees. Moreover, because of its relationship with the International Red Cross, the Red Cross is required to have autonomous status.

In *Irwin Memorial*, the threshold issue in determining if the Red Cross was an agency for Freedom of Information Act purposes was whether there was substantial federal control or supervision over the Red Cross. After analyzing the structure and purposes of the Red Cross, the 9th Circuit announced the "Red Cross is undoubtedly a close ally of the United States government, but its operations are not subject to substantial federal control or supervision." *Id.*, at 1057-58. This analysis is instructive in the present context.

The fact the Red Cross receives some federal does not alter the result. *See San Francisco Art & Athletics, Inc.*, 483 U.S. at 546. Neither does the fact the Red Cross is a federally-chartered organization which has to report its expenditures to Congress. *See id.* Moreover, although the Red Cross carries out essentially public functions, it does not perform functions which " 'traditionally [have been] the *exclusive* prerogative' of the Federal Government." *Id.* The Red Cross originated from a private organization.

The question of how Ms. Sullivan administered the HIV/AIDs program through the Red Cross, and the extent of the Red Cross's supervision and control over Ms. Sullivan are not relevant to this analysis: the Red Cross's relationship to the Federal government, not its relationship to Ms. Sullivan, is what is relevant.

Since Defendant is not a government actor in the constitutional context, Plaintiff has not, and cannot, allege government action. Plaintiff's free exercise claims both are dismissed with prejudice.[1] Since Plaintiff's section 1983 claim is premised on a First Amendment violation, that claim also is dismissed with prejudice.

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[1] Since a free exercise claim cannot be asserted against the Red Cross, the court does not reach the interesting question whether the facts alleged by plaintiff would constitute a free exercise violation. *See Daniel v. Paty*, 435 U.S. 618 (1978).

Plaintiff's Religious Freedom Restoration Act claim is also dismissed with prejudice because that Act does not apply to the Red Cross. The Court holds the Red Cross is not the "government" as defined by the statute. Since creation of the Act in 1993, there has been no case stating whether the Red Cross falls within RFRA's definition of "government," or analyzing what factors are relevant to determine whether a particular organization falls under the Act's definition of "government." Nevertheless, the Act's statutory language and legislative history demonstrate its purpose is to clarify what test should be used to decide First Amendment free exercise cases. Nothing in the language or legislative history suggests the Act was meant to expand the Free Exercise Clause.

The Court applies the same factors used in deciding whether the Red Cross was a government actor for constitutional purposes and holds the Red Cross is not a government instrumentality subject to RFRA. Thus, Plaintiff's RFRA claim is dismissed without leave to amend.

Plaintiff's section 1983 claim must also be dismissed because Plaintiff has not properly alleged state action. Plaintiff alleges the Red Cross's actions are state action because the Red Cross is Federally-funded. Under this funding theory, however, Plaintiff actually would be asserting Defendant's actions are federal action, not state action. Since section 1983 does not apply to Federal action, Plaintiff's funding allegations do not state a valid section 1983 claim.

Even without this "federal v. state" defect, government funding does not automatically convert the Red Cross's action into government action. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Rather, private actors only can be held liable under § 1983 if there is a sufficiently close nexus between the state and the challenged action of the private entity, so that the action of the entity fairly may be treated as the action of the state itself. *Lopez v. Department of Health Services*, 939 F.2d 881 (9th Cir. 1991). Plaintiff has not alleged this nexus.

The fact Ms. Sullivan is employed by the County of Orange does not automatically establish state action. *See Polk County v. Dodson,* 454 U.S. 312, 321 1981). The Court must look at the nature of her conduct, as well as the surrounding circumstances, to determine if her alleged wrongful action was related to her state duties. *Anthony v. County of Sacramento, Sheriff's Dept.* , 845 F.Supp. 1396, 1400 (E.D. Cal. 1994). Nothing in the present complaint suggests Sullivan's actions while at the Red Cross were taken pursuant to any state authority. In fact, Plaintiff precludes this by alleging

> [a]t all times relevant herein, Susan Sullivan has been and is now the agent or employee of Defendant American Red Cross, and as to all of her acts herein alleged was so acting within the course and scope of such agency or employment with the American Red Cross.

Complaint, ¶ 9.

Plaintiff may amend the section 1983 claim if he thinks a proper claim can be alleged.

Plaintiff's California Civil Code § 51 Unruh Civil Rights claim does state a cause of action for which relief can be granted. Unruh (1) does not prohibit businesses from adopting reasonable rules of conduct for their patrons and (2) does not inhibit the right of a business to exclude any individual from the advantages or privileges of the business if that individual violates these rules. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 725-26, *cert. denied*, 459 U.S. 858 91982). In the context of this motion to dismiss, however, the Court cannot assume Defendant's regulations were reasonable. Moreover, according to Plaintiff's allegation, Plaintiff has not violated any rule set out by Defendant. Therefore, Plaintiff has stated a valid Unruh claim.

Nevertheless, Plaintiff's Unruh claim must be dismissed because it is apparently barred by the statute of limitations. Plaintiff alleges he was denied unconditional certification as

an HIV/AIDS instructor on February 5, 1993. Plaintiff filed this suit on February 21, 1995, 2 years and 16 days later. Unruh claims are subject to the California *Code of Civil Procedure* § 340 (3)'s one-year statute of limitations. *Mitchell v. Sung*, 816 F.Supp. 597, 601-02 (ND Cal. 1993).[2] Plaintiff cannot escape this statutory bar by alleging a continuing violation, since the doctrine is inapplicable in refusal to hire situations, which are analogous to Plaintiff's situation. *See, e.g., Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980) (explaining continuing violation doctrine applies when (1) a present employee brings a claim alleging his employer (2) engages in systematic discrimination).

The October 1994 letter cannot be considered a new discriminatory act. There was no new qualification and rejection of plaintiff. The decision had already been made, and defendant simply adhered to its earlier decision. If Plaintiff could extend the statute of limitations by repeatedly asking Defendant to change its mind about its original decision, the statute of limitations would be meaningless.

However, Plaintiff may amend his Unruh claim if he believes he can plead around the statute of limitations.

Plaintiff's claim for injunctive relief is dismissed with prejudice, since it relies on Plaintiff's defective allegation he was deprived of his constitutional right to free exercise of religion.

Plaintiff's motion for a preliminary injunctive is denied. The motion is based on Plaintiff's defective federal and state constitutional claims. Since those claims are dismissed with

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[2] Plaintiff's constitutional claims and § 1983 claim also are apparently time barred. *See Van Strum v. Lawn*, 940 F.2d 406, 408-10 (9th Cir. 1991) (applying one-year limit to civil rights claims arising in California directly from constitutional provisions); *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991) (applying one-year limit to § 1983 actions arising in California).

prejudice, Plaintiff cannot show his Complaint raises serious questions in which he has a probability of prevailing.

For the reasons stated above, Defendant's motion to dismiss is granted, and Plaintiff's motion for preliminary injunction is denied. Plaintiff may have 20 days to amend his section 1983 and Unruh claims.

DATED: June 14, 1995

/s/

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

## CHAPTER 21B RELIGIOUS FREEDOM

**Section**

2000bb. Congressional findings and declaration of purposes
2000bb-1. Free exercise of religion protected
2000bb-2. Definitions
2000bb-3. Applicability
2000bb-4. Establishment Clause unaffected

**§ 2000bb.** Congressional findings and declaration of purpose

**(a) Findings**

The Congress finds that—

(1) the framers of the Constitution recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

**(b) Purposes**

**The purposes of this chapter are—**

(1) to restore the compelling interest test as set forth in Sherbet v. Verber, 874 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub.L. 103-141, § 2, Nov. 16, 1993, 107 Stat.1488)

## HISTORICAL AND STATUTORY NOTES

### References in Text

This chapter, referred to in subsec. (b), is Pub.L. 103-141, Nov. 16, 1993, 107 Stat. 1488, known as the Religious Freedom Restoration Act of 1993, which enacted this chapter and amended section 1988 of this title and section 504 of Title 5, Government Organization and Employees. For complete classification of this Act to the Code see section 1 of Pub.L. 103-141, set out as a Short Title note under this section and Tables.

### Short Title

Pub.L.103-141, § 1, Nov. 16, 1993, 197 Stat. 1488, provided that: "This Act (enacting this Chapter; amending section 1988 of this title and section 504 Title 5, Government Organization and Employment; and enacting a provision set out as a note under this section may be cited as the Religious Freedom Restoration Act 6, 1993."

### Legislative History

For legislative history and purpose of Pub.L. 103-141, see 1993 U.S. Code Cong. And Adm. News p.___

**§ 2000bb-1**. Free exercise of religion protected

**(a) In general**

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

**(b) Exception**

Government may substantially burden a person's of religion only if it demonstrates that application of the burden to the person -

(1) is in furtherance of a compelling government interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

**(c ) Judicial relief**

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Construction. [Pub. L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488]

**HISTORICAL AND STATUTORY NOTES**

**Legislative History**

For legislative history and purpose of Pub. L. 103-141, see 1993 U.S. Code Cong. And Adm. News, p.—

**§ 2000bb-2. Definitions**

As used in this chapter -

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub. L, 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489

## HISTORICAL AND STATUTORY NOTES

**Reference Text**

This chapter, referred to in provisions proceeding par. (1), is Pub.L. 103-141, Nov. 15, 1993, 107 Stat. 1488, known as the Religious Freedom Restoration Act of 1993, which enacted this chapter and amended section 1988 of this title and section 504 of Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see section 1 of Pub.L. 103-141, set out as a Short Title note under section 2000bb of this title and Tables.

**Legislative History**

For legislative history and purpose of Pub.L. 103-141, see 1993 U.S. Code Cong. And Adm. News, p.—

**§ 2000bb-3. Applicability**

**(a) In general**

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise; and whether adopted before or after November 16, 1993.

**(b) Rule of construction**

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicity excludes such application by reference to this chapter.

**(c ) Religious belief unaffected**

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489)

## HISTORICAL AND STATUTORY NOTES

### References in Text

This chapter, referred to in text, is Pub. L. 106-141, Nov. 16, 1993, 107 Stat. 1488, known as the Religious Freedom Restoration Act of 1993, which enacted this chapter and amended section 1988 of this title and section 504 of Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see section 1 of Pub.L. 103-141, set out as a Short Title note under section 2000bb of this title and Tables.

### Legislative History

For legislative history and purpose of Pub.L. 103-141, see 1993 U.S. Code Cong. And Adm. News, p.—

### § 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be constructed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

## HISTORICAL AND STATUTORY NOTES

### Reference in Text

This chapter, referred to in text, is Pub.L. 103-141, Nov. 16, 1993, 107 Stat. 1488, known as the Religious Freedom Restoration Act of 1993, which enacted this chapter and amended section 1988 of this title and section 504 of Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see section 1 of Pub.L. 103-141, set our as a Short Title note under section 2000bb of this title and Tables.

### Legislative History

For legislative history and purpose and Pub.L. 103-141, see 1993 U.S. Code Cong. And Adm. News, p.—

THE CODE OF THE LAWS

# OF THE

# UNITED STATES OF AMERICA

## TITLE 36—PATROTIC SOCIETIES AND OBSERVANCES

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## CHAPTER 1. AMERICAN NATIONAL RED CROSS

Section


1. Corporation created
1a. Continuation of corporation; incorporators; powers and duties
2. Name of corporation; powers
3. Purposes of corporation
4. [Repealed]
4a. Membership; status of chapters; rules and regulations governing chapters; election of officers.
5. Board of Governors; number; election; tenure; filling vacancies; annual meetings; voting by proxy
6. Reports; account audit by Department of Defense
7. Reimbursement of Department of Defense for auditing expenses
8. Reservation of right to amend or repeal certain sections
9. Endowment fund
10, 11. *[Repealed]
12. [Repealed]
13. Permanent building at headquarters in Washington, D.C.
14. [Omitted}]

15. Memorial building to Women of World War I; expenditures; supervision

16. Exchange of Government-owned cotton for articles containing wool

17-17b. [Repealed]

**CROSS REFERENCES:**

This chapter is referred to in 42 USCS § 5142.

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**§1. Corporation created**

Clara Barton, Hillary A. Herbert, Thomas F. Walsh, Charles. C. Glover, Charles J. Bell, Mabel T. Boardman, George Dewey, William R. Day, Nelson A. Miles, James Tanner, William K. Van Reypen, John M. Wilson, Simon Wolf, James R. Garfield, Gifford Pinchot, S. W. Woodward, Mary A. Logan, Walter Wyman, of Washington, District of Columbia; George H. Sheilds, of Missouri; William H. Taft F.B. Loomis, Samuel Mather, of Ohio; Spencer Trask, Robert C. Ogden, Cleveland H. Dodge, George C. Boldt, William T. Wardwell, John G. Carlisle, George B. McClellan, Elizabeth Mills Reid, Margaret Carnegie, of New York; John H. Converse, Alexander Mackay-Smith, J. Wilkes O'Neill, H. Kirke Porter, of Pennsylvania; Richard Olney, W. Murray Crane, Henry L. Higginson, William Draper, Frederick H. Gillet, of Massachutsetts; Marshall Field, Robert T. Draper, Frederick H. Gillett, of Massachusetts; William Lincoln, Lambert Tree, of Illinois; A. G. Kaufman, of South Carolina; Alexander W. Terrell, of Texas; George Gray, of Delaware; Redfield Proctor, of Vermont; John W. Foster, Noble C. Butler, Robert W. Miers, of Indiana; John Sharp Williams, of Mississippi; William Alden Smith, of Michigan; Horace Davis, W.W. Morrow, of California; Daniel C. Gilman, Eugene Lovering, of Maryland; J. Taylor Ellyson, of Virginia; Daniel R. Noyes, of Minnesota; Emanuel Fiske, Marshall Fiske, of Connecticut,

together with five other persons to be named by the President of the United States, one to be chosen from each of the Departments of State, War, Navy, Treasury, and Justice, their associates and successors, are created a body corporate and politic in the District of Columbis.

(Jan. 5, 1905, ch 23, § 1 in part, 33 Stat. 599.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Other Provisions:**

**Preamble**. Act. Jan. 5, 1905, ch 23, § 1 in part, 33 Stat. 599; May 8, 1947, ch 50, §§ 1, 2, 61 Stat. 80, provided:

Whereas on the twenty-second of August, eighteen hundred and sixty-four, at Geneva, Switzerland, plenipotentiaries respectively representing Italy, Baden, Belgium, Denmark, Spain, Portugal, France, Prussa, Saxony, and Wurttemberg and the Federal Council of Switzerland agreed upon ten articles of a treaty or convention for the purpose of mitigating the evils inseparable form war; of ameliorating the condition of soldiers wounded on the field of battle, and particularly providing, among other things, in effect, that persons employed in hospitals and in according relief to the sick and the wounded and supplies for this pupose shall be deemed neutral and entitled to protection; and that a distinctive and uniform flag shall be adopted for hospitals and ambulances and convoys of sick and wounded and an arm badge for individuals neutralized; and

"Whereas said treaty has been ratified by all of said nations, and by others subsequently, to the number of forty-three or more, including the United States of America; and

"Whereas the said treaty has been revised and extended by a treaty or convention for the amelioration of the condition of the wounded and the sick of armies in the field, signed at Geneva, July 27, 1929, and adhered to by the United States of America, effective August 8, 1932; and the sick of armies in the field, signed at Geneva, July 27, 1929, and adhered to by the United States of America, effective August 8, 1932; and

"Whereas the International Conference of Geneva of eighteen hundred and sixty-three recommended 'that there exist in every country a committee whose mission consists in cooperating in times of war with the hospital service of the armies by all means in its power'; and "Whereas a permanent organization is an agency needed in every nation to carry out the purposes of said treaties, and especially to secure supplies and to execute the humane objects contemplated by said treaties, with the power to adopt and use the distinctive flag and arm badge specified by said treaties, on which shall be the sign of the Red Cross, for the purpose of cooperating with the 'Comité International de Secours aux Militaires Blessé' (International Committee of Relief for the Wounded in War); and

"Whereas in accordance with the requirements and customs of said international body such an association adopting and using said insignia was formed in the city of Washington, District of Columbia, in July, eighteen hundred and eighty-one, known as "The American National Association of the Red Cross,' reincorporated April seventeenth, eighteen hundred and ninety-three, under the laws of the District of Columbia, and reincorporated by Act of Congress in June, nineteen hundred; and

"Whereas it is believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision: Now, therefore,".

Reorganization of military departments. Act July 26, 1947, ch 343, Title II, § 201, 61 Stat. 499: Aug, 1949, ch 412, § 4, 63 Stat. 579, created the Department of Defense [originally National Military Establishment] containing the Department of the Army, the Department of the Navy, and the Department of the Air Force as separate military departments within the Department of Defense.

Act July 26, 1947, ch 343, Title II. § 205(a), 61 Stat. 501, designated the Department of Ward to be the Department of the Army and changed the title of the Secretary of War to Secretary of the Army. Act July 26, 1947, ch 343, Title II, § 207(f), 61 Stat. 503, transferred certain functions of the Secretary of the Army and the Department of the Army to the Secretary of the newly created Air Force and the Department of the Air Force.

Act. Aug. 10, 1956, ch 1041, § 53, 70A, Stat. 641; repealed Act July 26, 1947, ch 343, Title II. § 205(a). 61 Stat. 501; however, Act. Aug. 10, 1956, § 1 which enacted 10 USCS §§ 1 et seq. Continued the Department of the Army under the administrative supervision of a Secretary of the Army, see 10 USCS §§ 3010 et. Esq.

## CROSS REFERENCES

This section is referred to in 36 USCS §§ 1a, 2, 8.

## INTERPRETIVE NOTES AND DECISIONS

Court judicially knows that American National Red Cross is corporation organized by act of Congress. American

Nat. Red Cross v. Felzner Post, Inc. (1928) 86 Ind App 708, 159 NE 771.

## § 1a. CONTINUATION OF CORPORATION; INCORPORATES; POWERS AND DUTIES

The corporation now existing as The American National Red Cross under the Act of January 5, 1905, as amended, shall continue as a body corporate and politic in the District of Columbia. The first national convention after the enactment of this amendatory Act [enacted May 8, 1947] shall be convened and held under rules and regulations prescribed by the governing body of the corporation as presently constituted. After such first national convention, the Board of Governors of the corporation from time to time shall constitute the associates and successors of the incorporators named in the said Act of January 5, 1905, and neither the said incorporators nor any associates or successors theretofore designated by them or by their successors shall have any powers or duties. (May 8, 1947, ch 50, § 8, 61 Stat. 83).

### HISTORY; ANCILLARY LAWS AND DIRECTIVES

**References in text:**

"The Act of January 5, 1905", referred to in this section, is Act Jan. 5, 1905, ch 23, 33 Stat. 599, which is classified to 36 USCS §§ 1 et seq.

### INTERPRETIVE NOTES AND DECISIONS

American Red Cross sued in state court in Florida by residents of Florida was entitled to remove to federal court, since it was a citizen of District of Columbia though doing business in Florida. Patterson v. American Nat. Red Cross (1951, DC-Fla) 101 Fsupp 655.

For diversity purposes, the American National Red Cross is a citizen of the District of Columbia because of the statutory language of 36 USCS§ 1a. Redington v. Touch Ross &

Co. (1977, SD NY) 428 F supp 483, revd on other grounds (CA2 NY) 592 F2d 617, revd on other grounds 442 US 560, 61 L Ed 2d 82, 99 S Ct 2479, on remand (CA2 NY) 612 F2d 68, 22 CBC 111.

**§ 2. Name of corporation; powers**

The name of this corporation shall be "The American National Red Cross", and by the name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate ofr the purposed of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white-ground, as the same had been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish by-laws and regulations not inconsistent with the laws of the United States of America and or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of this act and promote the purposes of said organization; and the corporation hereby created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority. (Jan. 5, 1905, ch 23, § 2, 33 Stat. 600; May 8, 1947, ch 50, § 3, 61 Stat. 81).

HISTORY; ANCILLARY LAWS AND DIRECTIVES

**References in text:**

"This act", referred to in this section, is Act Jan. 5, 1905, ch 23, 33 Stat. 599, which is classified to 36 USCS §§ 1 et seq.

**Amendments:**

1947, Act may 8, 1947, inserted "State or Federal", and to dispose of the same,"; substituted "to accept gifts, devises, and bequests of real and personal estate" for "to accept bequests" and "treaties" for "treaty"; and inserted "and July twenty-seventh, nineteen hundred and twenty-nine".

## CROSS REFERENCES

Loan of equipment needed for instructions and practice to organization formed by Red Cross aiding armed forces in ware time, 10 USCS § 2542.

American National Red Cross: cooperation and assistance. 10 USCS § 2602. Licenses for erection and use of building on military installations, 10 USCS § 2670.

Procurement of medical supplies and ordinance from military departments, 10 USCS §§ 4625, 9624, 9625.

Unlawful wearing or use of sign, insignia, or emblem. 18 USCS § 706.

Red Cross members or agent, 18 USCS § 917.

Saint Elizabeth's Hospital facilities available, 24 USCS §180.

Exclusion from gross income, of proceeds of certain sports programs conducted for benefit of American National Red Cross, 26 USCS § 114.

Veterans' representative in prosecution of claims, 38 USCS § 3402.

Surplus property donated by General Services Administrator, 40 USCS § 484.

This section is referred to in 36 USCS §§ 1a, 8.

## INTERPRETIVE NOTES AND DECISIONS

1. Establishment of by-laws and regulations.

2. Receipt of gifts and other property

3. Power to sue and be sued

4. Exemption from taxation

### 1. ESTABLISHMENT OF BY-LAWS AND REGULATIONS

Congress has not expressed any intent to immunize Red Cross from State labor laws; to the contrary, 36 USCS § 2 expressly grants Red Cross right to establish bylaws and regulations not inconsistent with laws of the United States or any State thereof. American Nat. Red Cross v Labor Relations Com. (1973) 363 Mass 525, 296 NE2d 214.

### 2. RECEIPT OF GIFTS AND OTHER PROPERTY

Holographic will stating "please forward all to Red Cross," sufficiently designated American National Red Cross as beneficiary. Lovskog v American Nat. Red Cross (1940, CA9 Alaska) 111 F2d 88.

Transfer of funds to local Red Cross either as gift or as trust was transfer to main corporation and it had primary interest in fund which it might defend in court and on appeal. American National Red Cross v Felzner Post, Inc. (1928) 86 Ind. App 709, 159 NE 771.

### 3. POWER TO SUE AND BE SUED

The American National Red Cross may sue and be sued and garnishment proceeding based on contractual liability may be maintained against it. Ragan v. Dodge County Chap-

ter American Red Cross (1946) 73. Ga App 432, 36 SE2d 831.

### 4. EXEMPTION FROM TAXATION

The American National Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and this immunity has not been waived by the 1960 Amendments of 26 USCS § 3301 et seq. Department of Employment v United States (1966) 385 US 355, 17 L Ed 2d 414, 87 S Ct 464.

American National Red Cross, as national corporation, has privileges and immunities of domestic corporation, and therefore bequest to it is exempt from estate transfer taxes. Osborn v Oklahoma Tax Com. (1954, Okla) 279 P2d 1096.

### § 3. Purposes of corporation

The purposes of the corporation are and shall be—

First. To furnish volunteer aid to the sick and wounded of Armed Forces in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hundred and sixty-three, and also of the treaties of the Red Cross, or the treaties of Geneva, of August twenty-second, eighteen hundred and sixty-four, and July twenty-seventh, nineteen hundred and twenty-nine, to which the United States of America has given its adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion.

Second. And for said purposes to perform all the duties developed upon a national society by each nation which has acceded to any of said treaties or conventions.

Third. To succeed to all rights and property which have been hitherto [prior to Jan. 5, 1905] held and to all duties which have heretofore [prior to Jan. 5 1905] been performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June 6, 1900, which Act is hereby

repealed and the organization created thereby is hereby dissolved.

Fourth. To act in matters of voluntary relief and in accord with the military authorities as a medium of communication between the people of the United States of America and their Armed Forces, and to act in such matters between similar national societies of other governments through the "Comitè International de Secours", and the Government and the people and the Armed Forces of the United State of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same. (Jan. 5, 1905, ch 23, § 3, 33 Stat. 600; May 8, 1947, ch 50, §4, 61 Stat. 81; July 17, 1953, ch 222, § 4(a), (b), 67 Stat. 179.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**References in text:**

"Act of Congress June 6, 1900", referred to in this section, is Act June 6, 1900, ch 784, 31 Stat. 277, which was unclassified.

**Amendments:**

1947. Act May 8, 1947, in para. "First", substituted "treaties" for "treaty", inserted "and July twenty-seventh, nineteen hundred and twenty-nine" and substituted "has given adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion" for "gave its adhesion on March first, eighteen hundred and eighty-two"; and in para. "Second", substituted "treaties and conventions" for "treaty".

1953. Act July 17, 1953, in para. "First", substituted "Armed Forces" for "armies"; and, para. "Fourth", substituted "military authorities" for "military and naval authorities", and "Armed Forces" for "Army and Navy".

## CROSS REFERENCES

Cooperation and assistance to the armed forces. 10 USCS § 2602.

Operation of American Red Cross vessels under Neutrality Act of 1939, 22 USCS § 444.

Voluntary agencies, 22 USCS § 2176.

This section is referred to in 36 USCS §§ 1a, 2, 8.

§4. [Repealed]

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

This section (Acts Jan. 5, 1905, ch 23, § 4, 33 Stat. 600; June 23, 1910, ch 372, § 1, 36 Stat. 604) was repealed by Act June 25, 1948, ch 645, § 21, 62 Stat. 862, effective Sept. 1, 1948, as provided by § 20 of Act June 25, 1948. It related to fraudulent representation or use of insignia. Similar provisions are now contained in 18 USCS §§ 1, 706 and 917.

§ 4a. Membership; status of chapters; rules and regulations governing chapters; election of officers

Membership in the American National Red Cross shall be open to all the people of the United States; its Territories, and dependencies, upon payment of the sums specified form time to time in the bylaws.

The chapters of the American National Red Cross shall be the local units of the corporation within the States and Territories of the United States of America. The regulations with respect to the granting of chapters and the revocation of the same, the territorial jurisdiction of the chapters, the relationship of the chapters to the corporation and compliance by the chapter with the policies and rules of the corporation, shall be as determined from time to time by the Board of Governors. Such regulations shall require that each chapter shall, in the election of the governing body of the chapter and in the selection of delegates to the national convention of the corporation, adhere to democratic principles of election as specified in the bylaws. (Jan. 5, 1905, ch 23, § 4a, as added May 8, 1947, ch 50, § 5, 61 Stat. 81.)

**CROSS REFERENCES**

This section is referred to in 36 USCS §§ 1a, 2, 8.

**§ 5. Board of Governors; number; election; tenure; filling vacancies; annual meetings; voting by proxy**

The governing body of the corporation in which powers of the government, direction, and management of the corporation shall be lodged, shall consist of a Board of Governors numbering fifty persons, to be appointed or elected in the manner following, namely:

(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such function as may from time to time be prescribed in the bylaws; and the remainder shall be officials of department of Red Cross programs and objectives. Of these at least one and not more than three shall be selected from the armed forces.

(b) Thirty Governors shall be elected by the chapters. The Governors so elected shall be elected at the national convention under procedures for nomination and election which shall

be such as to insure equitable representation of all the chapters, having regard to geographical considerations, to the size of the populations served by the chapters.

(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. The Governors so elected shall be individuals who are representative of the national interests which it is the function of the Red Cross to serve, and with which it is desirable that the corporation shall have close association.

The term of office of all Governors shall be three years, except that the term of office of any Governor appointed by the President of the United States (other than the principal officer of the corporation) shall expire if and when such Governor shall retire, prior to the date on which his term as Governor would otherwise expire, from the official position held at the time of his appointment as Governor.

Of the first Board of Governors to be selected hereunder, those Governors to be elected pursuant to subsection (b) of the section 5 shall be elected at the first national convention following the enactment of this Act [enacted May 8, 1947], those Governors to be elected pursuant to subsection ( c ) shall be elected as soon as practicable following such first national convention and those Governors to be appointed pursuant to subsection (a) shall be appointed so as to take office at the same time. The Governors so elected pursuant to subsections (b) and ( c ) shall be divided by lot into three classes, the terms of which shall expire at the end of one, two, and three years, respectively, so that thereafter one-third of the members of the Board of Governors elected pursuant to subsections (b) and ( c ) will be chosen at the time of each national convention, and shall take office at such time or as soon as practicable thereafter.

The President of the United States shall fill as soon as may be any vacancy that may occur by death, resignation, or otherwise in the office of the principal officer of the corporation or

in the membership of the first Board of Governors appointed by him. Any vacancy that may occur in the Governors elected by the chapters pursuant to subsection (b) or in the Governors-at-large elected by the Board of Governors pursuant to subsection ( c ), shall be temporarily filled by appointment made by the Board of Governors, such appointees to serve until the next national convention.

The Board of Governors shall have Power (i) to appoint from its own members an executive committee of not less than eleven persons, who, when the Board of Governors is not in session, shall have and exercise all the powers of the Board of Governors, and (ii) to appoint and remove, or provide for the appointment and removal of, all officers and employees of the corporation, except the principal officer designated by the President of the United States.

The annual meeting of the corporation shall be the national convention of delegates of the chapters, which shall be held annually on such date and at such place as may be specified by the Board of Governors. In all matters requiring a vote at the national convention, each chapter shall be entitled to not less than one vote . The number of votes which each chapter shall be entitled to cast shall be determined according to allocation by the Board of Governors, which shall be established on an equitable basis giving consideration both to the size of the membership of the chapters and to the size of the populations in the territories served by the chapters. Such allocations shall be reviewed at least every five years.

Voting by proxy shall not be allowed at any meeting of the Board of Governors, or at the national convention, or at any meeting of the chapter: Provided, however, That in the event of any national emergency which in the opinion of the Board of Governors makes attendance at the national convention impossible, the Board of Governors may permit the election of Governors by proxy at the national convention. (Jan. 5, 1905, ch 23, & 5, 33 Stat. 601; Dec. 10, 1912, ch 1, & 1,

37 Stat. 647; Mar. 3, 1921, ch 131, & 1, 41 Stat. 1354; May 8, 1947, ch 50, & 6, 61 Stat. 82.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Explanatory notes:**

Act Jan 5, 1905, ch 23, § 5, 33 Stat. 601, as originally enacted, contained provisions for the first annual meeting in December, 1905, which have been omitted by the codifiers of the United States Code as temporary.

**Amendments:**

1912. Act Dec. 10, 1912, changed date of annual meeting from first Tuesday after first Monday in December to Wednesday preceding second Thursday in December.

1921. Act Mar 3, 1921, provided that the executive committee of the central committee should consist of nine instead of seven persons, five of whom should be a quorum.

1947. Act May 8, 1947, amended this section in its entirety to enlarge the governing board and make the method of selection of its members more democratic by having chapters elect Governors at a national convention under procedures which insure equitable representation and allowing proxy voting in event of national emergency.

## CROSS REFERENCES

This section is referred to in 36 USCS §§ 1a, 2, 8.

### § 6. Reports; account audit by Department of Defense

The American National Red Cross shall as soon as practicable after the first day of July of each year make and transmit to the Secretary of Defense a report of its proceedings for the fiscal

year ending June 30 next preceding, including a full, complete, and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the Department of Defense, and a copy of said report shall be transmitted to Congress by the Department of Defense.
(Jan. 5, 1905, ch 23, § 6, 33 Stat. 602; Feb. 27, 1917, ch 137, 39 Stat. 946; July 17, 1953, ch 222, § 222, § 4( c ), 67 Stat. 179.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Amendments:**

**1917.** Act Feb. 27, 1917, required reports of the preceding fiscal year to be made as soon as practicable after first of July of each year instead of on January first of each year.

**1953.** Act July 17, 1953, substituted "Secretary of Defense" and "Department of Defense" for "Secretary of War" and "War Department" respectively.

## CROSS REFERENCES

**This section is referred to in 36 USCS §§ 1a, 2, 8.**

## INTERPRETIVE NOTES AND DECISIONS

A report which did not contain itemized statement of receipts and expenditures and which came from no official source, is not admissible as evidence in prosecution for violating Espionage.

Act [22 USCS §§401-408, 462, 465; 30 USCS §§ 40, 42 191, 192]. Graznow v. United States (1919, CA8 Iowa) 261 F 172.

### § 7. Reimbursement of Department of Defense for auditing expenses

The American National Red Cross annually shall reimburse the Department of Defense for auditing the accounts of the American National Red Cross, as required by the Act approved February 27, 1917, and the sum, so paid shall be covered into the Treasury of the United States as a miscellaneous

receipt.

(May 29, 1920, ch 214, § 1 in part, 41 Stat. 659; July 17, 1953, ch 222 § 5, 67 Stat. 179.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**References in text:**

"The Act approved February 27, 1917", referred to in this section, is Act Feb. 27, 1917, ch 137, 39 Stat. 946, which amended Act Jan. 5, 1905, ch 23, § 6, 33 Stat. 602, located at 36 USCS § 6, to require an itemized report of receipts and expenditures.

**Amendments:**

**1953.** Act July 17, 1953, substituted "Department of Defense" for "War Department".

**§ 8. Reservation of right to amend or repeal certain sections**

Congress shall have the right to repeal, alter, or amend this Act at any time. (Jan. 5, 1905, ch 23 § 7, 33 Stat. 602.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**References in text:**

"This Act", referred to in this section, is Act Jan. 5, 1905, ch 23, 33 Stat. 602, which is classified to 36 USCS §§ 1 et seq.

**§ 9. Endowment fund**

The endowment fund of the American National Red Cross shall be kept and invested under the management and control of a board of nine trustees, who shall be elected from time to time by the Board of Governors under such regulations regarding terms and tenure of office, accountability, and expense as the Board of governors shall prescribe.

(Jan. 5, 1905, ch 23, § 8, as added June 23, 1910, ch 372, § 2, 36 Stat. 604; May 8, 1947, ch 50 § 7, 61 Stat. 83.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Amendments:**

**1947.** Act May 8, 1947, substituted "Board of Governors" for "incorporators and their successors".

## CROSS REFERENCES

**This section is referred to in 36 USCS §§ 1a, 2, 8.**

**§§ 10, 11. [Repealed]**

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

These sections (§§10, 11--Act Apr. 24, 1912, ch 90, §§ 1, 2, 37 Stat. 90, 91; June 29, 1943, ch 176, §§ 1, 2, 57 Stat. 247, 248) were repealed by Act July 17, 1953, ch 222, § 6, 67 Stat. 179, Section 10 related to land and naval forces in time of war; § 11 related to transportation, subsistence and passport fees. Similar provisions are now contained in 10 USCS § 2602.

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

This section (Act June 3, 1916, ch 134, § 127a, as added June 4, 1920, ch 227, Subchapter I, § 51, 41 Stat. 785; July 17, 1953, ch 222, § 3, 67 Stat. 178) was repealed by Act Aug. 10, 1956, ch 1041, § 53, 70A Stat. 683. Section 12 related to buildings for Red Cross supplies. Similar provisions are contained in 10 USCS § 2670.

§ 12 [Repealed]

**§ 13. Permanent building at headquarters in Washington, D.C.**

Authority is hereby given to the American National Red Cross to erect upon square 172, in the city of Washington, District of Columbia, in replacement of the temporary building or buildings erected on such lot under Public Resolution Numbered 3, Sixty-fifth Congress (S. J. Res. 61), a permanent building for the use of the American National Red Cross in connection with its work in cooperation with the Government

of the United States. Said permanent building shall remain the property of the United States but under the supervision of the Director of Public Buildings and Public Parks of the National Capital [Administrator of General Services], and the American National Red Cross shall at all times be charged with the responsibility, the care, keeping, and maintenance of said building without expense to the United States. (Feb. 7, 1930, ch 42, §§ 1, 5, 46 Stat. 66.)

## HISTORY: ANCILLARY LAWS AND DIRECTIVES

**References in text:**

"Public resolution Numbered 3", referred to in this section is Joint Res. May 22, 1917, ch 21, 40 Stat. 90, which is unclassified.

**Explanatory notes:**

The first sentence of this section comprises § 1 of Act Feb. 7, 1930 ch 42, 46, Stat. 66, and the remainder of this section comprises § 5 of such Act.

The bracketed name "Administrator of General Services" was inserted in this section to denote the following transfer of functions: All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries, including those of the Director of Public Buildings and Public Parks of the National Capital, were consolidated in an office of National Parks, Buildings, and Reservations in the Department of the Interior by Ex. Or. No. 6166, § 2, June 10, 1933, located at 5 USCS § 901 note. The name of the latter office was changed to "National Park Service" by Act Mar. 2, 1934, Ch 38, § 1, 48 Stat. 389.

The functions of the Director of the National Park Service relating to public buildings were transferred to the Federal Works Administrator by Reorg. Plan No. 1 of 1939, § 303, (b), located at 5 USCS § 903 note.

The Branch of Buildings Management of the National Park Service, with certain other agencies, was consolidated as the Public Buildings Administration under the Federal Works Agency by §§ 301 and 303 of Reorg. Plan No. 1 of 1939, located at 5 USCS § 903.

The Federal Works Agency was abolished and its functions were transferred to the Administrator of General Services by Act June 30, 1949, ch 288, Title I, § 103, 63 Stat. 380. For effective date of transfer of functions see Effective date note located at 40 USCS § 471.

**Other Provisions:**

**Building for District of Columbia Chapter**. J. Res. July 1, 1947, ch 195, §§ 1-10, 61 Stat. 241, provided:

"That authority be, and is hereby, given to the American National Red Cross to erect upon the south half of square 104 in the city of Washington, District of Columbia, a permanent building for the use of the District of Columbia Chapter, American National Red Cross, in connection with its work, in cooperation with the Government of the United States and its responsibilities under its charter granted by the Congress of the United States.

"SEC. 2. That the plans of the proposed building shall first be approved by the American National Red Cross, the Commission of Fine Arts and the National Capital Park and Planning commission and the erection and design thereof shall be under the supervision of the Administrator of the Federal Works Agency [now Administrator of General Services] in accordance with the provisions of the Public Buildings Act of May 25, 1926, as amended and as hereby further amended [former 40 U.S.C. § 341].

"SEC. 3. That the cost of the removal of the buildings on this site shall be borne by the American National Red Cross, District of Columbia Chapter, without expense to the United States.

"SEC 4. That said permanent building shall remain the property of the United States but under the supervision of the Administrator of the Federal Works Agency [now Administrator of General Services] and the American National Red Cross, District of Columbia Chapter, shall, at all times be charged with the responsibility, care, keeping , and maintenance of said building without expense to the United States.

"SEC. 5. That moneys of the American National Red Cross, District of Columbia Chapter, available for the construction of the aforesaid building, including any amount administratively determined necessary for the payment of salaries and expenses of personnel engaged upon the preparation of plans and specifications, field supervision, and general office expenses, may be transferred to and expended by the Public Buildings Administration of the Federal Works Agency [now Administrator of General Services], and such funds may be consolidated in the books of the Treasury Department into a special account for direct expenditure in the prosecution of said work, and the Commissioner of Public Buildings is authorized to prepare drawings and specifications for this building prior to the approval by the Attorney General of the title to such acquisition.

"SEC. 6. That said building shall be appropriate in design and character and shall be used by the American National Red Cross, District of Columbia Chapter, and shall cost not less than $1,000,000: *Provided*, That this expenditure shall include complete equipment.

"SEC. 7. That the person, firm, or corporation which the Commissioner of Public Buildings shall select to furnish professional architectural and engineering services required for the project shall be chosen from nominations made by the American National Red Cross, District of Columbia Chapter.

"SEC. 8. That the National Capital Housing Authority is hereby authorized and directed to transfer to the jurisdiction of the Federal works Administrator such part of the site for

said buildings as is now under the jurisdiction of said Authority: *Provided*, That the Treasurer of the United States is authorized and directed to credit said Authority with the fair market value, at the date of transfer, of the property so transferred: *Provided further*, That the Federal Works Administrator is hereby authorized to utilize the property so transferred, as well as that part of the site already under his jurisdiction, for the purposes of this Act [this note].

"SEC. 9. That the Federal Works Administrator, through the Public buildings Administration, is hereby authorized to furnish steam, from the central heating plant for the heating of said building, such steam to be paid for by the American National Red Cross, District of Columbia Chapter, at such reasonable rates, not less than cost, as may be determined by the Federal Works Administrator: *Provided*, That the Federal Works Administrator, through the Public Buildings Administration is authorized to prepare plans and specifications and to supervise and to contract for the work necessary to connect said building with the Government mains and to pay the cost of such work and services, including administrative expenses, from the funds consolidated into the Treasury pursuant to section 5 thereof [§ 5, this note].

SEC. 10. The enactment of this joint resolution [this note] shall not be construed as establishing a policy of the United States Government to furnish building sites for Red Cross chapters or any eleemosynary institution at any other place".

**§ 14. [Omitted]**

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

This section (Act May 5, 1926, ch 246, 44 Stat. 403) was omitted as obsolete. It related to use of buildings In Washington, D.C. Similar provisions are now contained in 36 USCS § 13.

§ 15. Memorial building to Women of World War I; expenditures; supervision

[The memorial building to commemorate the services and sacrifices of the patriotic women of the United States of America, of its insular possessions, and of the District of Columbia during the World War, erected on the land occupied in part on June 7, 1924, by the Memorial to the Women of the Civil War, the permanent headquarters of the American Red Cross, shall be used by the American National Red Cross.]

The expenditures for said memorial building shall be made under the direction of a commission consisting of the chairman of the Senate Committee on the Library and the chairman of the House Committee on the Library. That said memorial building shall remain the property of the United States Government but under the supervision of the Superintendent of Public Buildings and Grounds [Administrator of General Services], and the American Red Cross shall at all times be charged with the responsibility, the care, keeping, and maintenance of the said memorial building without expense to the United States.

(June 7, 1924, ch 369, §§ 1, 2, 4, 43, Stat. 665, 666)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Brackets were placed around the first unnumbered para. Of this section to denote that it is stated in the language of the codifiers of the United States Code. It is derived from Act June 7, 1924, ch 369, §§ 1. 2. and 4, 43 Stat. 665.

The bracketed words: "Administrator of General Services" were inserted to denote the following transfer of functions: The building provided for in this section was originally placed under the supervi-

sion of the "Superintendent of Public Buildings and Grounds" by Act June 7, 1924. The office of Public Buildings and Grounds under the Chief of Engineers was abolished and the functions of the Chief of Engineers and of the Secretary of War with respect thereto were transferred to the Director of Public Buildings and Public Parks of the National Capital by Act Fe. 26, 1925. All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries, including those of the Director of Public Buildings and Public Parks or the National Capital, were consolidated in an office of National Parks, Buildings, and Reservations in the Department of the Interior by Ex. Or. No. 6166, § 2, June 10, 1933, located at 5 USCS § 901 note. The name of the latter office was changed to "National Park Service" by Act Mar. 2, 1934 ch 38. § 1, 48 Stat. 389. The functions of the Director of the National Park Service relating to public buildings were transferred to the Federal Works Administrator by Reorg. Plan No. 1 of 1939, § 303, (b), located at 5 USCS § 903 note. The Branch Buildings Management of the National Park Service, with certain other agencies, was consolidated as the Public Buildings Administration under the Federal Works Agency by §§ 301 and 303 of Reorg. Plan No. 1 of 1939, located at 5 USCS § 903.

The federal Works Agency was abolished and its functions were transferred to the Administrator of General Services by Act June 30, 1949, ch 288, Title 1, § 103, 63 Stat. 380. For effective date of transfer of functions see Effective date note located at 40 USCS § 471.

**§ 16. Exchange of Government-owned cotton for articles containing wool**

The American National Red Cross or any other organization to which the Government-owned cotton has been or shall hereafter be delivered pursuant to law is hereby authorized, if it shall be deemed advisable to exchange any cotton for cloth or wearing apparel or other articles of clothing containing wool.
(Mar. 3, 1933, ch 214, 47 Stat. 1544.)

**§§ 17--17b. [Repealed]**

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

These sections (§§17-17b --Act July 17, 1953, ch 222, §§ 1, 2, 7, 67 Stat. 178, 179) were repealed by Act Aug 10, 1956, ch 1041, § 53, 70A Stat. 641. Section 17 related to use of the American Red Cross in cooperation with the Armed Forces: § 17a related to furnishing transportation, meals, and quarters to American Red Cross personnel by the government: § 17b related to the status of American Red Cross personnel as government employees. Similar provisions are now contained in 10 USCS § 2602.